Ramar Coal Company *and* United Mine Workers of America and District 28, United Mine Workers of America. Case 11–CA–13265

June 28, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On January 17, 1991, Administrative Law Judge William N. Cates issued the attached decision. The Charging Party filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings that counsel for the General Counsel failed to establish essential factual elements of the unfair labor practices alleged, we have applied the preponderance of the evidence standard employed in our proceedings. We have not relied on any failure of counsel for the General Counsel to ''conclusively'' establish her case, as the judge noted at two points in his decision.

Patricia L. Timmins, Esq., for the General Counsel.
Mark M. Lawson and *Mark Grahm, Esqs. (White, Elliott & Bundy)*, of Bristol, Virginia, for the Respondent.
James J. Vergara, Esq., of Hopewell, of Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. I heard this 8(a)(5), (3), and (1) case in Bristol, Virginia, on August 13 and 14, 1990. The case originates from an unfair labor practice charge filed on April 4, 1989, and thereafter amended on June 28, 1989, and March 29, 1990, by United Mine Workers of America and District 28, United Mine Workers of America (Union) against Ramar Coal Company (Company or Respondent). It is alleged in the charge that the Company, since on or about December 1988, unilaterally changed its hiring practices as well as the hours worked for certain classes of its employees in three ways. First, that it failed to hire Bill Boyd, Charles Matney, Peck Ray, Donald Coon, and other panel members because of their union membership; second, that it assigned less hours to its employees who were panel members; and third, that it refused to schedule panel members Roy Rife, David Peery,[1] John Ball, and Jimmy Couch[2] to work on April 5, 1990.[3]

On March 30, 1990, after an investigation, the Acting Regional Director for Region 11 of the National Labor Relations Board (Board) issued the complaint.

All parties were afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs.

Based on the entire record, including a careful study of the posttrial briefs filed by counsel for the General Counsel and counsel for the Respondent, and on my observation of the witnesses as they testified and my judgment of the inherent probabilities, I conclude, as explained later, that the Company has not violated the Act in any manner alleged in the complaint. Accordingly, I recommend the complaint be dismissed in its entirety.

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits it operates a coal processing business in Buchanan County, Virginia, and during the 12 months preceding the issuance of the complaint, which constitutes a representative time, it sold and shipped from its site products valued in excess of $50,000 directly to Jewel Ridge Mining Corp. (JRMC), a Virginia company which sold goods and products valued in excess of $50,000 directly to points outside the commonwealth of Virginia. I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties admit, and I find, the Union is, and at all times material has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

For an extended period, JRMC operated among other facilities one known as the 18 coal preparation plant in Buchanan County, Virginia, which was later operated by the Respondent.[4] JRMC was a party to the 1984 National Bituminous Coal Wage Agreement (1984 agreement) and operated its 18 preparation plant with its own employees until 1987 when it entered into an agreement with RBJ Coal Co. for that Company to operate its 18 preparation plant. Thereafter in the spring of 1988, the Respondent entered into a contract with JRMC whereby it agreed to operate JRMC's 18

[1] It appears Peery is the correct spelling of this individual's name, however, his name appears with various spellings throughout the record. The same is true with regard to the spelling of the names of various other individuals who testified or were referred to in the record. The spellings provided in this decision are believed to be correct notwithstanding the various ways names are spelled throughout the record.

[2] I granted counsel for the General Counsel's motion to delete Bobby Puckett's name from this listing of employees.

[3] I granted counsel for the General Counsel's motion to delete par. 7 of the complaint in its entirety.

[4] A preparation plant is a facility designed to take raw coal and process it by removing inert materials so the coal may be sold at specifications set by the purchaser. The Company herein is provided a fee for processing the coal. The Company receives no compensation when it does not process coal. The Company does not own any of the coal it processes.

preparation plant. The 18 preparation plant was part of JRMC's overall mine and preparation facility at its Buchanan County, Virginia location which included not only the 18 preparation plant but 18 and 18A deep mines as well. The Company herein commenced operating the 18 preparation plant in May 1988. There is no issue of unlawfulness regarding the Company's hiring practices until December 1988. The controversy regarding the hiring of employees from December 1988 forward centers around certain rights known as panel rights that the former employees of JRMC had with the Company.

The Company's contract with JRMC sets forth its obligations regarding former JRMC employees. A portion of that agreement, which was placed in evidence by the Union, at section 32 reads as follows:

> 32. *Successorship*. The Contractor agrees to be a successor to any and all obligations of the Owner under the expired National Bituminous Coal Wage Agreement of 1984 (hereinafter referred to as the ''NBCWA of 1984'') at Owner's No. 18 Preparation Plant facility, and Contractor specifically agrees to hire from the panel in accordance with the expired provisions of Article IA(h)(2)–(6) of the expired National Bituminous Coal Wage Agreement of 1984. It is recognized that the foregoing requirements are material undertakings of Contractor, and that failure of Contractor to properly comply therewith may be deemed by Owner to be a material breach of this Agreement. It is further recognized that the foregoing obligations are not included in this Agreement as a matter of any contractual or legal obligation of the Owner to do so, but as a matter of the Owner's business practice.

Article IA, Scope and Coverage, section (h), Leasing, Subleasing and Licensing out of Coal Lands, subsections (2)–(6) of the expired 1984 agreement follows:

> (2) For purposes of lawfully preserving and protecting job opportunities for the Employees working or laid off from a particular operation covered by this Agreement, and to assure that work opportunities are not eliminated by lease or license arrangements, the Employer agrees that it will not lease, sublease, or license out coal mining operations which at any time were in operation by that Employer and covered by this Agreement, unless the conditions set forth in the following paragraph are satisfied:
>
> Leasing, subleasing or licensing out of coal mining operations covered by this Agreement shall be permitted where the lessee-licensee agrees that all offers of employment by such lessee-licensee shall first be made (on the basis of mine seniority) to the Employer's classified and laid-off Employees at the mine who have not secured regular employment at any other operation of the Employer covered by this Agreement, if such employment at the leased, subleased or licensed out operation is for jobs of the nature covered by this Agreement, and if such Employees are qualified for such jobs. The lessee-licensee shall not be required to make more than one such offer of employment to each such Employee:
>
> (3) Acceptance or rejection of such an offer of employment made by a lessee-licensee or any personnel action between the Employee and lessee-licensee shall not affect such Employee's panel rights with the Employer as established by this Agreement.
>
> (4) Any dispute regarding the rights of Employees secured by subsection (2) above shall be resolved between the prior Employer and the Employee under Article XXIII of this Agreement. The Employer agrees that it will reserve in any lease, sublease or license subject to this Section the ability of the Employer to remedy any finding as to noncompliance of an Employee's right to be considered for employment opportunity as provided herein.
>
> (5) The prior Employer shall not be a guarantor or be held liable for any breach by the lessee-licensee of its hiring or bargaining obligations or the terms of any agreement between the Union and the lessee-licensee.
>
> (6) Within ten (10) days after the lease, sublease or licensing out of any coal producing or coal preparation facilities, but in any event prior to the time that any classified work commences, the Employer shall provide notice thereof to the appropriate District President. Such notice shall disclose the identity of all parties to the transaction, the location of the facilities affected thereby, and the identity of the coal producing or coal preparation facilities affected thereby.

The ''panel'' referred to above (and throughout this decision) for JRMC originated when the employees it laid off filled out ''BCOA-UMWA Standardized Panel Form[s].'' A sample copy of that form follows:

BCOA-UMWA STANDARDIZED PANEL FORM

_____
Employer

To be filled out by Employer:

Employee's Name: _____ S.S. No.: ____
Mine: _____ UMWA District No. _____
Seniority Date at the Mine: ____ Date Laid Off: ____
Length of Service with Present Employer in UMWA Dist. _____
Yr. Mo. Day
Total Length of Service with Present Employer:
_____
Yr. Mo. Day
Job Title When Laid Off:_____
Previous Mining Experience with other Employers:

Job Performed	Name of Company
1. _____	_____ From____ To____
2. _____	_____ From____ To____
3. _____	_____ From____ To____
4. _____	_____ From____ To____
5. _____	_____ From____ To____

To be filled out by Employee:

What jobs do you have the ability to perform and wish to be recalled to:

_____ _____ _____
_____ _____ _____

_____ _____ _____

What mines of present Employer in UMWA District No. ____ do you wish to panel for: _____

What mines of present Employer within contiguous UMWA District No. ____ do you want to panel for:

_____ _____ _____
_____ _____ _____

Signature: _____ Date: _____
Address: _____
Phone Number: _____
Witness: Employer: _____
UMWA _____
_____
Original to Employer

These forms, when filled out, are referred to as ''panel sheets'' and when combined for a particular facility (such as JRMC) it creates the panel for that facility.

As maybe noted from the above sample panel sheet, a laid-off employee lists, among other things, the facility the employee was working at the time of his or her layoff. That facility is known as the ''mother mine'' for that employee. Upon layoff, that employee has recall rights from the mine panel superior to those who have never worked at that particular facility. The laid-off employee lists any previous work experience with employers other than the mother mine employer and lists jobs the employee has ''the ability to perform'' and to which the employee wishes ''to be recalled to.'' When an employee lists a job the employee wishes to be recalled to, the employee is in effect certifying he or she is qualified to perform that particular job.[5] When an employee lists other operations the employee wishes to be recalled to, the employee is not exercising mother mine rights but, as credibly testified to by Pittston Coal Group[6] Personnel Manager Conley Parsley Jr., is enrolling on the district panel for recall purposes. Parsley specifically described the mother mine concept as follows:

> By virtue of an employee's employment at a particular operation he has, under the contract, what's called mother mine panel rights in that that employee would have first option or first recall rights above employees who had not worked at that operation before.

Simply stated, an employee with mother mine rights has superior recall rights over anyone who has not worked at that, but at some other, facility within the union district. If more than one employee has ''mother mine'' rights at a facility recalling employees, then recall is based on seniority, ability, and the desire of the employee to be recalled for a specific task. One of the key questions in dispute in the instant case is what constitutes the mother mine for the employees of JRMC at its Buchanan County, Virginia facility inasmuch as the JRMC employees sought recall to the Company here. As noted earlier, JRMC operated not only the 18 preparation plant at the facility involved here but also operated deep mines 18 and 18A at that same facility.

Counsel for the General Counsel and the Union contend the panel from which the Company was required to hire its employees was composed of employees from JRMC's 18 and 18A deep mines as well as employees from its 18 preparation plant. The Company contends its panel for hiring was composed solely of those JRMC employees who had worked at the 18 preparation plant and urges it had no obligation to consider or hire JRMC employees that had worked at JRMC's 18 or 18A deep mines.

I note the panel for a particular facility may change from time to time as employees are laid off and add their names to the panel. However, the relevant panel in question—JRMC panel—had the last addition to it made in 1987. The fact that RBJ Coal Co. operated the 18 preparation plant in question before the Respondent assumed that function did not cause the panel to become a ''RBJ panel''[7] rather it remained a JRMC panel. The Respondent and RBJ Coal Co. both utilized the JRMC panel. The employees that worked for RBJ Coal Co. remained on the JRMC panel while they worked for RBJ Coal Co. and after the time it ceased operating.

Before examining the Respondent's obligations related to the panel and its selections therefrom, it is necessary to decide the composition of the panel applicable to the Company.

Field Representative and Union District 28 President Donnie Lowe testified he was familiar with panel rights as a result not only of his position with the Union but as a coal miner himself. Lowe explained the panel procedure was designed to protect the recall rights of laid-off employees. Lowe further explained that when employees are laid off they fill out ''panel sheets'' on which they list their mine seniority, when they were laid off, the mine they were laid off from, and the jobs and mines they wish to be recalled to.[8] Lowe testified:

> You are automatically recalled to the mines that you were laid off from or the seniority unit that you were laid off whether you list that one or not you are offered recall rights to that operation based on the jobs that you listed that you wanted to recall to.

Lowe testified he received panel sheets from RBJ Coal Co. which were the same panel sheets for the ''seniority unit'' to be utilized by the Company herein and that the panel sheets he received included employees that had worked at JRMC's deep mines 18 and 18A as well as JRMC's 18 preparation plant. Lowe specifically stated that employees of the 18 and 18A deep mines had panel rights for recall at the 18 preparation plant.

Pittston Coal Group Personnel Manager Parsley testified he maintained panel sheets at his office for the JRMC operations and more specifically that he had responsibility for the panel sheets for JRMC's 18 preparation plant. Parsley stated that in his capacity with the Pittston Coal Group, he was very familiar with panel rights in general and specifically fa-

[5] The practice, it appears, has been for an employer to give an employee a test to ascertain whether the employee can perform the tasks indicated. Also, specifically with the Company here, it appears that if the person doing the hiring knew the individual could not perform the work indicated the employee was not considered for employment. This later procedure was followed by the Company in its initial hirings of which counsel for the General Counsel does not object.

[6] JRMC is a subsidiary of the Pittston Coal Group.

[7] There is no contention the Company here is a successor to RBJ Coal Co.

[8] On cross-examination, Lowe testified the expired 1984 agreement called for the employer superintendent, and the recording secretary of the local to be the joint custodians of the panel for any particular employer.

miliar with panel rights and the mother mine concept for JRMC's 18 preparation plant. Parsley stated the instant Company had no obligation to hire anyone that had worked at JRMC's 18 or 18A deep mines. He explained the instant Company was only obligated to hire those that had worked at JRMC's 18 preparation plant because that was the mother mine for such individuals. Parsley did explain that those who had worked at ''18A and 18 mines had job bidding rights to the 18 preparation plant'' but he added, ''working 18 mine and 18A mine alone did not grant you panel rights'' because the ''connection was for job bidding purposes only to the tipple.'' Parsley testified that if someone had worked at one of the two deep mines and desired to be recalled to the preparation plant, such recall would be from the district panel and he said the Company here had recall obligations that ''extended only to mother mine panel members, not to the district panel members.''

Company Consultant Orville Sykes testified he has been a consultant to various coal companies since 1980. He said that prior to that time (starting in 1975) he had been an elected field representative for the Union and that from 1975 until 1979 he had served on the Union's international executive board. Sykes testified that from his experience, both with the Union and for management, he had became familiar with the mother mine concept and panel rights specifically panel rights related to the expired 1984 Agreement and how such rights applied to the Company herein. Sykes testified employees had ''seniority from [JRMC's 18 mine] to [JRMC's 18A mine] but they had to bid to get to [JRMC's 18] preparation plant.'' Sykes said he explained to Company owner Ashby the obligations his company had with respect to the panel and employee rights thereunder.

Company Owner James Ashby Sr. testified that when he was in preliminary negotiations with JRMC to lease its 18 preparation plant he, like others, was provided the assistance of a contract manager from the Pittston Coal Group. Owner Ashby testified he had ''various sessions'' with Pittston Contract Manager Vincent Calvert before he signed a contract with JRMC and that during those sessions, Calvert ''explained [his obligations] to [him].'' Ashby testified Company Consultant Sykes whom he said he specifically employed ''as an adviser,'' took him ''through the procedures'' he needed to follow on matters such as his obligations related to the panel sheets. Ashby testified Company Superintendent Shelton also provided him guidance with respect to his obligations related to the panel sheets and explained the mother mine concept to him. Ashby testified:

> I was told that the way you call back on these panel sheets was, if the mines—or the man—had paneled and worked at Jewel 18 Prep plant, call them back if they could do the job. Go by classification seniority.
>
> All right, if they had paneled from some other operation, that I did not have to worry about them. That they was not on my panel sheet. So, the only thing I had to deal with, according to the people that I talked to, was the people that had originally worked at Jewel 18 Prep plant.
>
> . . . .
>
> I was told by Mr. Calvert, if I recalled anyone that it would be strictly by the panel sheets, classification seniority, but they would have to have been 18 Preparation plant employees. And they would have had to have been laid off from 18 Preparation plant. Not to concern myself with anyone else except 18 Preparation plant people.

Pittston Coal Group Personnel Manager Parsley impressed me as a truthful witness. Accordingly, I credit his explanation of the mother mine concept and panel procedures related to employee panel rights. Parsley has, for a number of years, been in a position that allowed him to become fully familiar with both the ''mother mine concept and panel rights.'' I recognize he was only a somewhat, but not totally, disinterested third party witness;[9] however, I do not find such to warrant a different conclusion with respect to his overall credibility. I am persuaded that based on his experience and position he accurately explained the mother mine concept and panel rights. His understanding of these two concepts does not appear to be refuted by any record documentation. The pages of the agreement between JRMC and the Company placed in evidence here appears to support his understanding of these matters. Further, his testimony was corroborated in essential part by that of Company Consultant Sykes and Superintendent Lester. Lowe, who testified the panel for the Company here, included employees who had worked at JRMC's 18 and 18A deep mines as well as JRMC's 18 preparation plant, appears to have confused ''panel rights'' with ''bidding rights.'' Furthermore, he did not exhibit a good memory on certain matters about which it is expected he should have recalled. For example, Lowe asserts he provided Owner Ashby with panel sheets and complained to Ashby the Company was violating panel rights in its hiring process; however, Lowe could not even recall the time of year or at what bargaining session he asserts he provided the panel sheets and made related comments to owner Ashby.

On the basis of the above, I conclude that under the mother mine concept only those employees that had worked at JRMC's 18 preparation plant could claim that facility as their mother mine. I further conclude the Respondent was only obligated to consider for employment those panel employees that indicated their prior employment with JRMC had been at its preparation plant.

Having concluded the Respondent was only obligated to consider for employment those individuals that had previously worked at JRMC's 18 preparation plant, I shall now consider whether it complied with its obligations in that regard.

First, I note counsel for the General Counsel does not take issue with any hirings by the Company prior to December 1988. In her posttrial brief, for the General Counsel asserts, ''It is also undisputed that [the Company] recognized its obligation under the lease agreement with [JRMC] to hire its employees from the [JRMC] panel and did so from the time it commenced operations until the pay period ending December 10 [1988] when it began hiring employees from nonpanel sources.'' Accordingly, the focus of examination with respect to counsel for the General Counsel's attempt to establish a prima facie case will start in December 1988 and proceed forward from that time.

[9] JRMC is a subsidiary of the Pittston Coal Group which is Parsley's employer.

It is alleged at paragraph 8 of the complaint that the Company failed and refused to hire panel members Bill Boyd, Charles Matney, Peck Ray, and Donald Coon. In considering these complaint allegations, it is helpful to examine what panel sheets were available to the Company on approximately what dates and from what sources. Three sets of panel sheets were introduced into evidence at trial. First, Field Representative and District 28 President Lowe identified a series of panel sheets he asserts were provided to him probably in June 1987 by Raymond Jackson of RBJ Coal Co. That panel contained employee panel sheets from JRMC's 18 and 18A deep mines as well as JRMC's 18 preparation plant.[10] Lowe testified that at one of the bargaining sessions with the Company, sometime between May 1988 and April 1989, he furnished a copy of the panel sheets he had obtained from Raymond Jackson to Company Owner Ashby.

Owner Ashby testified he received a series of panel sheets from Lowe during negotiations but said he received far more sheets than Lowe contends he provided. Ashby testified he sorted the JRMC 18 preparation plant panel sheets from the JRMC 18 and 18A deep mines sheets Lowe provided and after doing so had approximately 50 to 60 sheets. Ashby testified he continually asked for, and in May 1990 received, panel sheets for his operation from the Pittston Coal Group. He said the panel sheets he received included sheets from JRMC's 18 preparation plant as well as JRMC's 18 and 18A deep mines. Ashby said he telephoned the Pittston Coal Group and was told he was only obligated to consider for employment those on JRMC's 18 preparation plant panel sheets. He said he was told he could disregard the remainder of the sheets.[11]

Pittston Coal Group Personnel Manager Parsley identified a series of panel sheets about which he stated, ''This is the mother mine panel for Jewel 18 preparation plant.'' He said the panel sheets had been under his office's care and added that only those individuals listed in that panel had recall rights at the JRMC 18 preparation plant.[12]

Finally, Owner Ashby testified, and his testimony was corroborated by consultant Sykes, that he picked up approximately 16 panel sheets from the Pittston Coal Group on May 2, 1988, from which initial hirings were made. Ashby explained that some on that initial panel were not hired because the Company was seeking the smallest number of best qualified employees it could get to start the JRMC 18 preparation plant.

Turning now to those specifically named in paragraph 8 of the complaint, I note owner Ashby and Superintendent Shelton both testified the Company had no JRMC 18 preparation plant panel sheet for Boyd. Although there was no panel sheet for Boyd in the JRMC panel produced at trial by Pittston Coal Group Personnel Manager Parsley, he did have a panel sheet. It reflects JRMC's 18A deep mine as his mother mine.[13] Owner Ashby testified Boyd was considered for employment at the preparation plant because he held himself out as a welder and electrician. Ashby said Boyd brought a panel sheet to the facility when he sought employment. Ashby said at the time he needed to hire someone as a welder so he told Superintendent Shelton to give Boyd a welding test even though Boyd's mother mine was JRMC's 18A deep mine. Ashby testified Shelton later told him Boyd refused to take a welding test saying he was not a certified welder. Ashby testified the Company did not require its employees to be certified welders[14] rather it just required that they pass a welding test. Boyd refused to take such a test. Ashby and Shelton testified they thereafter needed an electrician but stated Boyd refused to take a ''little'' electrician's test. Shelton testified ''[Boyd] couldn't handle nary one of [the two jobs.]''[15] Shelton testified without contradiction he hired Gerald Keene for the welding job he interviewed Boyd for and stated Keene was on JRMC's 18 preparation plant panel.[16]

Charles Matney was on JRMC's 18 preparation plant panel.[17] Superintendent Shelton testified he contacted Matney about a job and that Matney told him ''[h]e was under a doctor's care and the doctors had done cut him out of the mines.''

Counsel for the General Counsel in her posttrial brief argues the recall efforts related to Matney (as well as Donald Coon) are self-serving and unsupported. Yet, she did not call Matney to testify regarding any efforts Superintendent Shelton may have made to offer him employment or to address the status of his health at that time. Counsel for the General Counsel contends the Company had an obligation under these circumstances to send a letter to Matney offering him employment. However, a review of the provisions of the expired 1984 agreement applicable to the Respondent— article IA(h)(2)–(6)—with regard to hiring refers to ''offers of employment'' being made to ''qualified'' individuals—on the mother mine panel—and that the Company ''shall not be required to make more than one such offer of employment to each such employee.'' Article IA(h)(3) makes clear that ''[a]cceptance or rejection of such an offer of employment made by a lesse-licensee [such as the Respondent] shall not affect such Employee's panel rights with the Employer [JRMC] as established by this Agreement.'' Counsel for the General Counsel's contention that written notice must be given to those whom the Company is making ''offers of employment'' is not a part of the provisions of the agreement applicable to the Respondent but rather is set forth at article XVII(e), which refers to ''notice of recall'' and to loss of panel and seniority rights at the mine for a failure to respond. As noted above, no such loss of panel rights occurs by a failure to respond to ''offers of employment.'' Thus, I am persuaded the Company had no obligation to offer Matney employment by way of a certified letter. Even if such had been a requirement for the Respondent, I would conclude it would not have been required to engage in an act

[10] This particular panel, which was received in evidence as G.C. Exh. 3, contains 274 pages.

[11] This series of panel sheets, received in evidence as R. Exh. 3, contains 166 pages.

[12] These panel sheets, received in evidence as R. Exh. 20, contains 78 pages.

[13] A copy of Boyd's panel sheet is contained in G.C. Exh. 3, p. 37, and R. Exh. 3, p. 16.

[14] Ashby said it was great if those seeking employment were certified welders.

[15] Boyd was not called to testify regarding his attempts to gain employment with the Company.

[16] I grant Company's counsel unopposed motion to correct the transcript to reflect the correct spelling of Keene's name. Keene appears on the JRMC 18 preparation plant panel (see G.C. Exh. 3, p. 41 and R. Exh. 20, p. 78). Keene appears on the Company's payroll as of the week ending December 10, 1988. See G.C. Exh. 2, p. 3.

[17] See G.C. Exh. 3, p. 16 and R. Exh. 20, p. 39.

of futility related to Matney because he had clearly expressed to Superintendent Shelton that his doctors would not allow him to work.

Peck Ray was not on the mother mine panel for JRMC's 18 preparation plant but rather listed his mother mine as JRMC's 18A deep mine.[18] Thus, I am persuaded, as urged by the Company, it had no obligation to offer Ray employment. Furthermore, I note that all the jobs Ray listed he was capable of performing were deep mining jobs. There is, therefore, no reason to conclude the Company would otherwise have made Ray an offer of employment. Even if the Company had been obligated to offer Ray employment, Ashby testified Ray was gainfully employed at another company that Ashby owned, namely, Shenandoah Coal Co. and that Ray even continued to work at that company after Ashby ''got out of Shenandoah'' and another owner took over. Counsel for the General Counsel did not call Ray to testify. I credit Ashby's uncontradicted testimony outlined above. Not only was Ray not on the JRMC 18 preparation plant panel at relevant times, he was during the time in question gainfully employed at another mining operation.

Donald Coon was on the mother mine panel for JRMC's 18 preparation plant. Coon prepared his panel sheet on January 3, 1984, and reflected he had the ability to perform and wished to be employed as, among other things, a ''welder'' and/or ''mechanic and electrician.'' Superintendent Shelton testified he tried to locate Coon for a welder's position at the Company. Owner Ashby testified he tried unsuccessfully to telephone Coon. Ashby said Shelton told him he knew Coon personally and would go to his home to see if he would work for the Company. Superintendent Shelton testified ''I knew him [Coon] real well and I went to his house . . . and his trailer or nothing was there and some of the friends there said he was out of town.'' Coon amended his panel sheet on January 14, 1985, to reflect he had move from the Virginia area to the San Angelo, Texas area. Coon was not called as a witness. I credit Ashby's and Shelton's uncontradicted accounts of their attempts to employ Coon. Contrary to contentions made by counsel for the General Counsel, I find, for reasons already expressed elsewhere in this Decision, that the Company was not obligated to extend an ''offer of employment'' to Coon by certified letter. Counsel for the General Counsel's contention that Coon may just have been out of town when Superintendent Shelton dropped by does not seem likely in that Coon not only was not personally in the area, but his ''trailer'' or home had been removed from the Virginia area.

I am persuaded counsel for the General Counsel failed to establish even a prima facie case[19] that protected conduct was a motivating factor in the Company's failure and refusal to hire Boyd, Matney, Ray, and Coon on or after mid-December 1988.

Counsel for the General Counsel acknowledges hirings were proper and does not contend the Respondent engaged in any unlawfully motivated hirings prior to December 10, 1988. I note the Respondent had been selective in its hirings prior to December 10, 1988. The Company demonstrated that on and after December 1988 it needed employees with certain specific skills and counsel for the General Counsel failed to establish the Company's hiring criteria were pretextual. In that regard, the Company contended, and no convincing evidence to the contrary was presented, that it needed multiskilled employees especially employees with welding and electrical skills. There is no dispute that these particular skills were needed to maintain an aged preparation plant that frequently experienced breakdowns.

With respect to each of the specifically named employees in paragraph 8 of the complaint, I note the following. With respect to Boyd, counsel for the General Counsel failed to establish that he was even on the mother mine panel for JRMC's 18 preparation plant. Hence, the Company had no obligation to offer him employment. Furthermore, the employee that was ultimately hired for the welder's position Boyd was considered for—Gerald Keene—was a JRMC 18 preparation plant panel member. Even if counsel for the General Counsel had established a prima facie case with respect to Boyd, the Company demonstrated it would not have hired him even in the absence of any protected concerted conduct on his part inasmuch as Boyd refused to take either a welder's or an electrician's test to establish he was qualified to perform either task.

I am persuaded counsel for the General Counsel failed to establish a prima facie case of a refusal to hire Matney even though the evidence establishes he was on JRMC's 18 preparation plant panel. The evidence establishes the Company contacted Matney and he informed the Company his medical condition was such that his doctors would not permit him to work. As reflected earlier in this decision, the Company was under no obligation to make an offer of employment to Matney in writing. Even if the Company had been obligated to offer Matney employment by certified letter, it would not have, in my opinion, been obligated to do so in Matney's case because he specifically informed the Company he would not be permitted to work inside the mines because of health reasons. The Company would not have been required to engage in an act of futility—sending a letter to Matney—in order to protect itself from the possibility of unfair labor practice allegations.

Counsel for the General Counsel failed to establish a prima facie case with respect to Ray in that he was not on JRMC's 18 preparation plant panel. Accordingly, the Company had no obligation to offer him employment. Even if the Company had been required to offer Ray employment, he was gainfully employed in the mining industry—Shenandoah Coal Co.—at relevant times. Furthermore, all the experience he listed on his panel sheet was for deep mining. Even if the Company had otherwise been obligated to offer Ray employment, I am persuaded it demonstrated it would not have done so because Ray did not possess the skills needed by the Respondent.

Coon was on the proper panel sheet—JRMC's 18 preparation plant—however, the Company tried without success through Owner Ashby to contact him via telephone to offer him employment. Superintendent Shelton even went to Coon's home to offer him employment only to discover Coon had, as reflected on his amended panel sheet, left the Virginia area. As noted elsewhere, the Company was under no obligation to offer Coon employment in writing. Thus, with no showing of any overall antiunion animus and none demonstrated specifically with respect to Coon, I find coun-

[18] See G.C. Exh. 3, p. 268.

[19] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

sel for the General Counsel failed to meet her burden of establishing a prima facie case with respect to Coon.

That the Company hired nonpanel members after December 10, 1988, does not in and of itself establish a prima facie case of unlawful motivation nor does it demonstrate the Company unilaterally changed its hiring practices or that it discriminated against panel members in violation of the Act. I shall specifically review the status of each individual hired on and after December 1988 and until April 5, 1989,[20] that Union Field Representative and District 28 President Lowe identified as having been hired during that time without having been panel members.

Lowe identified Kenneth Shelton as having been hired around mid-December 1988.[21] It is undisputed that Shelton was hired as superintendent for the facility. Counsel for the General Counsel alleged in the complaint that Shelton was a supervisor within the meaning of Section 2(11) of the Act. There is no showing on this record that any panel member had Shelton's experience. Furthermore, there was absolutely no requirement that the Company offer employment to panel members for supervisory positions.[22] Thus, counsel for the General Counsel failed to demonstrate the Company engaged in any unlawfully motivated or unilaterally changed hiring practices or that it discriminated against panel members when it hired Shelton.

Lowe identified Bobby Austin as a nonpanel member hired after mid-December 1988.[23] Owner Ashby testified Austin was hired because he was a diesel mechanic and employees with such qualifications were hard to find.[24] Superintendent Shelton testified he reviewed the available panel sheets before he hired Austin and acknowledged Austin was not a panel member. He testified there were ''two men there at the plant which were diesel mechanics.'' He identified the two as Leonard Humphry and Ted Lester.[25] Shelton testified ''I notified both of them. They would not come back.[26] Nobody else was qualified for the diesel mechanic's job.''[27] Employees Peery, Puckett, and Rife, called as witnesses by counsel for the General Counsel, each testified Austin performed diesel/truck mechanic duties. Counsel for the General Counsel failed to demonstrate the Company engaged in any unlawful conduct when it hired Austin as a diesel mechanic in December 1988.

Lowe identified Jimmy Robbins[28] as a nonpanel member hired after December 1988.[29] Owner Ashby testified he hired Robbins as a diesel mechanic. Ashby testified the Company was ''having so many break downs on the trucks that I tried three, four men at one time as diesel mechanics.'' Employee Peery testified he observed Robbins performing mechanical work before Robbins was assigned to the second shift which shift primarily performed maintenance work. Peery claimed this mechanical work Robbins performed before he was assigned to the second shift was work other panel members also sometimes performed. However, Peery acknowledged that the work he observed Robbins performing was not ''in coal production'' but rather was maintenance work. Employee Puckett testified he observed Robbins ''doing a little mechanic work and welding.'' Employee Rife testified he observed Robbins ''helping mechanic on trucks and welding.'' Employee Williamson testified he observed Robbins performing ''mechanic work and welding'' and added he had never observed other employees performing that particular work. I am persuaded counsel for the General Counsel failed to demonstrate that any panel members had Robbins' qualifications. Accordingly, I find she has failed to demonstrate the Company violated the Act in any manner alleged in the complaint when it hired Robbins.

Lowe identified Don Williamson as having been hired after December 1988 without having been a panel member.[30] Owner Ashby testified Williamson held himself out as someone that ''could do just about anything.'' Ashby said the Company needed welders. He testified ''I gave [Williamson] a welding test'' and ''[t]he man could weld beautiful . . . a real super good job.'' Ashby said he specifically hired Williamson initially as ''a welder and a repairman'' but added ''he could do other jobs besides weld.'' Williamson, called as a witness by counsel for the General Counsel, testified he was a certified (by the Commonwealth of Virginia) welder and was hired in that capacity by Owner Ashby.[31] I am persuaded the Company established it was attempting to hire employees with welding or electrical skills and that it hired Williamson based on his welding skills which were needed at the time. I find counsel for the General Counsel failed to demonstrate that panel members whose panel sheets were in the possession of the Company at the time had Williamson's skills and/or were passed over without having been offered employment. Counsel for the General Counsel points out that the panel sheets provided at trial by Pittston Coal Group Personnel Manager Parsley as the mother mine panel for JRMC's 18 preparation plant reflected four individuals who were or desired to be employed as welders, namely, Charles Compton,[32] Ted Lester,[33] Howell Mitchell,[34] and Earl Henry Reynolds.[35] There is no conclusive showing on this record that these panel sheets, as provided by Parsley at

[20] The Union called a strike against the Company on April 5, 1989.

[21] Shelton appears on the Company's payroll records for the pay period ending December 10, 1988.

[22] Art. IA(h)(2) of the expired 1984 agreement obligated the Company to make offers of employment to panel members of the mother mine panel only for ''jobs of a nature covered by this agreement.''

[23] Austin appears on the Company's payroll for the period December 10, 1988.

[24] Austin's testimony regarding his skills is persuasive that he was a qualified diesel mechanic and that he primarily performed that function for the Company notwithstanding his ability to perform other tasks such as driving a truck.

[25] Lester and Humphry both were JRMC 18 preparation plant panel members. Humphry indicated he desired to be recalled as an electrician or diesel mechanic among other positions. Lester listed he was laid off as a ''truck mechanic'' and desired to be recalled among other things as a heavy equipment mechanic or an electrician.

[26] Neither Humphry nor Lester was called to testify. I credit Shelton's uncontradicted testimony that he offered employment to both.

[27] I note that of the 200 plus individuals that counsel for the General Counsel contends were on the panel, only two were diesel or truck mechanics when they were laid off, and only one sought recall as a diesel mechanic. (See G.C. Exh. 3, pp. 1–274.)

[28] Robbins' name is spelled differently at various places in the record. It appears the correct version is as set forth here.

[29] Robbins appears on the Company's payroll for the period ending January 7, 1989.

[30] Williamson first appears on the Company's payroll for the period ending February 4, 1989.

[31] Williamson testified Ashby asked if he was a certified welder and administered a welding test to him before he hired him.

[32] See R. Exh. 20, p. 19.

[33] See R. Exh. 20, p. 33.

[34] See R. Exh. 20, p. 40.

[35] See R. Exh. 20, p. 49.

trial, had been made or were otherwise available to Ashby at the time he hired Williamson. Furthermore, Lester, as noted elsewhere in this Decision, elected not to return to work at the Company. I note Charles Compton's, Howell Mitchell's, and Earl Henry Reynolds' panel sheets were not in the panel sheets that Owner Ashby said he received from the Pittston Coal Group in May 1990. Compton's and Mitchell's panel sheets do appear in the panel sheets United Field Representative and District 28 President Lowe said he received from Raymond Jackson of RBJ Coal Co. in June 1987. Lowe testified the Union provided Owner Ashby, at Ashby's request, a copy of the sheets RBJ Coal Co. had provided him. Lowe, however, could not say with certainty when the sheets were provided to Owner Ashby, just that it was sometime after the Company started hiring nonpanel members, but before the strike that started on April 5, 1989.[36] Therefore, whatever Lowe provided Ashby took place between mid-December 1988 and April 5, 1989. Williamson was hired at some point prior to February 4, 1989, inasmuch as he had worked 56 hours as of that date. Considering all the above, I am persuaded counsel for the General Counsel has not conclusively demonstrated the Company had Charles Compton's or Howell Mitchell's panel sheets at the time it hired Williamson. Earl Henry Reynolds' panel sheet does not even appear in the group Lowe contends he provided Ashby. In light of all the above, I am persuaded counsel for the General Counsel has not conclusively demonstrated the Company unilaterally altered it hiring practices or that it discriminated against panel members when it hired Williamson on or about February 1989.

Lowe identified Robert Puckett as having been hired after December 1988 without being on the panel.[37] Puckett, testifying as a witness for counsel for the General Counsel, stated he was not on JRMC's 18 preparation plant panel at the time he was hired. He said he had several years ''tipple'' experience and worked on the tipple with the Respondent initially, but was thereafter assigned to ''dropping rail cars.'' Owner Ashby testified the Company essentially needed electricians and welders but assigned employees to other tasks that needed to be performed. He said the Company needed, for example, among other employees, good welders dropping rail cars. Ashby said he hired Puckett because Puckett told him ''he could do anything'' and added Puckett was correct in his assessment of himself in that ''he could do anything.'' Ashby testified the Company had a good welder dropping cars and further noted Puckett was a good ''filter operator.'' Counsel for the General Counsel points out that Phillip Beavers, Roscoe Crouse, and Billy Ball were panel members with rail car dropping experience. However, none of them listed any welding experience or ability or even that they desired to be employed as welders. Inasmuch as the Company was trying to staff its facility with welders and electricians who could perform other tasks such as dropping rail cars, I am persuaded counsel for the General Counsel failed to demonstrate the Company unilaterally changed its hiring practices or unlawfully discriminated against panel members when it employed Puckett in February 1989.

Lowe identified Robert Wilson as having been hired after December 1988 without having been a panel member.[38] Owner Ashby testified he hired Wilson ''as a filter operator'' who told him he could and subsequently did perform other jobs such as ''beltman,'' ''cleanup,'' ''utility man,'' and ''you name it, we used [Wilson] for that.'' Counsel for the General Counsel did not dispute the Company's contention that Wilson was multiskilled. I conclude the Company's decision to hire Wilson was based on legitimate business considerations.

Lowe identified James Ashby Jr. as being employed after December 10, 1988, without having been a panel member. The records reflect Ashby Junior. was already in the employment of the Company as of the pay period ending December 10, 1988. He was at that time a salaried employee who remained in that status until his termination on January 9, 1989. He was thereafter reemployed on or about March 6, 1989, as an hourly paid employee until the pay period ending April 13, 1989, when the records reflect he again became a salaried employee. Thereafter, the payroll records reflect he was sometimes carried as a salaried employee while at other times as an hourly paid employee. Ashby described Ashby Junior as a 21-year old diesel mechanic that also worked all other positions at the business. Ashby testified Ashby Junior performed as a ''dozier operator,'' ''tipple operator,'' ''end loader operator,'' ''truck driver,'' ''filter operator,'' ''fine coal operator,'' ''sump operator,'' and ''helped weld on trucks.'' Ashby testified Ashby Jr. also ''ran parts'' as needed and told employees what he wanted done. Ashby said if he had not employed Ashby Junior he would have probably had to hire another diesel mechanic ''plus it would have probably put more on [superintendent] Shelton than what he could have done.'' Heavy equipment mechanic Bobby Austin testified Ashby Jr. helped him work on trucks. Austin testified Ashby Jr. did the same work on diesel engines as he did and had also helped him install ''transmissions'' and ''rear ends'' on the trucks. Austin testified ''putting in transmissions and rear ends and stuff like that is not a complicated job, but it takes two, maybe three men to do it.'' Austin testified his helpers did more ''physical labor'' of the heavy lifting nature whereas he, Austin, actually rebuilt compressors, transmissions, and the like. Employee Rife testified he observed Ashby Junior perform work as a mechanic and also driving a truck. Employee Puckett testified he observed Ashby Junior driving a truck and being around the mechanic's garage. Employee Williamson testified he observed Ashby Junior operating a dozier a few times. Employee Peery testified he observed Ashby Junior driving a truck and ''running a loader.''

The facts belie counsel for the General Counsel's contention that Ashby Jr. was not really a qualified diesel mechanic that he was simply used in the garage to assist in ''manually or physically lifting heavy or awkward size equipment.'' The evidence strongly supports the conclusion, which I have reached, that the Company rehired Ashby Junior on or about January 9, 1989, because he was a multiskilled worker who could, among other things, perform welding and function as a diesel mechanic. The fact Austin may have utilized Ashby to perform physical tasks does not detract from the fact he

[36] I again note the parties raise no issue with regard to the hiring practices of the Company prior to December 10, 1988.

[37] Puckett first appears on the Company's payroll for the period ending February 4, 1989.

[38] Wilson first appears on the Company's payroll for the period ending March 4, 1989.

could and did perform work requiring mechanical skills. Also, Ashby Junior could, as reflected by the testimony outlined above, perform numerous other tasks at the Company. I am persuaded counsel for the General Counsel has not demonstrated the Company unilaterally changed its hiring practices or discriminated against panel members when it hired Ashby Junior.

The remaining individuals that Lowe identified as having been employed after December 10, 1988, without having been panel members were all hired after the Union called a strike at the Pittston Coal Group as well as the Company on or about April 5, 1989. The Company sought in writing to have panel members that worked for it return to work after the strike started; however, the record does not reflect that any did. Thus, when the panel members declined a written request to return to work and remained on strike against the Company, the Company was then free to seek qualified employees elsewhere without violating the Act in any manner alleged in the complaint.

In summary, I am persuaded the Company demonstrated it needed welders and electricians and that its desire to employ individuals with those skills was not based on any antiunion sentiments nor was it an effort to unilaterally change its hiring practices without negotiating with the Union. Accordingly, I shall dismiss the 8(a)(5), (3), and (1) complaint allegations related thereto.[39] See *Hallmark & Son Coal Co*., 299 NLRB 259 (1990).

It is alleged at paragraph 9 of the complaint that the Company assigned less hours to its employees who were panel members on various dates since December 1988.

Panel employee Peery testified he started work for the Company ''car dropping'' but after approximately 3 months was assigned to the ''load-out operation.'' He said he observed that he and panel employee Rife were sent home more often than any other employees. Peery testified that when the Company first started operation employees were sent home more frequently than was the case after December 1988. Panel employee Rife testified he was initially hired as a truck-driver but later became a filter operator. Peery said if the Company ran out of coal or if the plant or the trucks broke down the employees were sent home. Rife stated that if the trucks hauling slate were broken down, the Company had to shut down because it was impossible to process coal through the preparation plant without the slate trucks being operational. Rife added that when the preparation plant was not operating, there was no need for a filter operator like himself.[40] Peery said panel employees Jimmy Couch and Bob Smith both drove trucks but were not always sent home when the trucks broke down. Peery acknowledged that on those occasions when he was sent home he never observed employees remaining on the job that he thought had no business being there or that were not performing their assigned tasks.

Superintendent Shelton, who assigned work for employees at the Company, testified that when he needed extra hours worked he asked for volunteers and if there were too many volunteers he rotated the extra work so all shared equally. He said if someone wanted to work extra hours but was not assigned on any given occasion to do so then that employee was the next one to be assigned extra work.[41] Shelton testified his approach to assigning work did not change at any time at the Company. Superintendent Lester, who succeeded Shelton, testified the nature of the work to be performed dictated precisely who would be asked to remain on site and work. Lester, in agreement with employees Peery and Rife, testified, ''When you can't haul your slate your plant's down. You can't run it. You can't operate.''

Counsel for the General Counsel failed to establish a prima facie case that the Company sent employees home or assigned employees less hours of work after December 1988 for reasons unrelated to performance. Panel employee Peery testified he observed employees Couch and Smith remain on the job during breakdowns but they were both panel members. Peery also testified he knew of no employees being allowed to remain on the site and work that he thought had no business being there or were not performing their primary job functions. It is acknowledged there is no need for ''loadout operators'' or ''filter operators'' at times when the plant is not operational. The plant simply cannot be operated when the slate trucks are broken down. It is undisputed that the Company has an incentive to keep its preparation plant operating because it does not make money unless it processes coal. Simply stated, counsel for the General Counsel failed to establish a prima facie case but even if she had established such a case, the Company clearly demonstrated it would have taken the actions it did even in the absence of any protected conduct on the part of any or all of its employees. Accordingly, I shall recommend that paragraph 9 of the complaint be dismissed in its entirety.

It is alleged at paragraph 10 of the complaint that the Company in violation of Section 8(a)(3) of the Act failed and refused to schedule panel employees Rife, Peery, John Ball, and Jimmy Couch to work on April 5, 1989.

Panel employee Peery testified he was told by owner Ashby on April 4, 1989, ''there wouldn't be work the next day.''[42] Peery acknowledged there had been occasions prior to April 4, 1989, when Ashby had told him there would be no work the following day and that it typically resulted from a ''breakdown or no coal or something like that.'' Peery stated that on those occasions prior to April 4, 1989, when Owner Ashby had stated there would be no work the following day, he had never said why nor had he ever asked Ashby why. Peery stated that even when the preparation plant was not operating, it was common practice to have certain maintenance employees remain at or report for work.

Peery further testified the Union called a strike against the Company on April 5, 1989, and that picketing started around 2 or 3 p.m. that day. Peery said he observed or believed that employees Rife, Couch, Ball, Puckett, and others were on the picket line on April 5, 1989, when the strike started.[43]

[39] Counsel for the General Counsel alludes in her posttrial brief to the fact that different wages were paid different employees and asserts none of these alleged changes were negotiated with the Union. I note there are no complaint allegations related to these assertions, nor was there any attempt at trial to amend the complaint in that respect. Accordingly, I have made no findings thereon.

[40] Perry testified Rife had nothing to do when the trucks hauling slate were broken down.

[41] Shelton qualified this to say the individual desiring the extra work had to be qualified to perform the type work needed.

[42] Panel employee Rife testified he was told on April 4, 1989, by someone, although he was not certain who, there would be no work the following day.

[43] As is noted elsewhere in this decision, employees that went on strike on April 5, 1989, were asked by the Company in writing to return to work.

Owner Ashby testified the Company experienced a breakdown at the preparation plant during the week of April 5, 1989. Specifically, he stated ''a drier had a hole in it.'' Employee Williamson, testifying for counsel for the General Counsel, said he was called in to work around 7 a.m. on April 5, 1989. He said there was so much maintenance work to be performed that day that he and two other employees ''split up and we all three (3) were working on different things.'' Williamson testified he worked that day on ''a dryer'' and ''some coal shakers.'' Williamson did not know what all may have caused the preparation plant to be down on April 5, 1989, but he said the coal dryer was at least one of the things. He said that as a result of the coal dryer being down, the Company simply ''couldn't run coal.''

Williamson, a certified welder, said he finished working on the coal dryer around 1 or 2 p.m. on April 5 and finished the workday repairing one of the coal shakers.

Ashby testified the Company experienced so many breakdowns at the plant he might have told employees on April 4 that the plant would not be operating on April 5, 1989, but added he normally had his superintendent make those types of announcements because employees could not ''work for two bosses'' and he tried not to supervise employees anymore than was absolutely necessary.

I am persuaded counsel for the General Counsel failed to establish a prima facie showing that protected conduct was a motivating factor in the Company's decision not to operate—produce coal—on April 5, 1989. Counsel for the General Counsel failed to demonstrate the Company could have, but did not, operate on that day. In fact, Williamson, a witness for counsel for the General Counsel, testified the dryer was out at the plant and the Company could not produce coal without it being operational. There were other problems at the plant as well on that date. Again, it was Williamson who testified that he had to repair coal shakers on that day. Williamson also testified there was so much maintenance work to be performed that day that he and two other employees with the skills necessary to bring about the needed repairs had to split into separate repair teams. I note there was nothing unusual about the Company telling its employees a day ahead of time there would be no work the following day. It had not been the Company's practice to announce to its employees the nature of the problem or problems that caused the facility not to be operational. Furthermore, the Company had no incentive to be out of operation in that it only made money if it produced coal. The fact the Company tried to have its employees, panel members included, return to work after the April 5, 1989 strike commenced mitigates against a finding the Company discriminated against panel members on April 5. In light of all the above, I conclude counsel for the General Counsel failed to demonstrate there was work available for Peery, Rife, Ball, and Couch on April 5, or that the Company failed to schedule them to work because they were panel members or because of any protected or union activities on their part. Accordingly, I shall recommend that paragraph 10 of the complaint be dismissed in its entirety.

CONCLUSIONS OF LAW

1. The Respondent, Ramar Coal Company, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Mine Workers of America and District 28, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not engaged in the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

The complaint is dismissed in its entirety.

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.